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# Supreme Court of the United States

OCTOBER TERM, 1964

No. 631

ROBBINS MEN'S & BOYS' WEAR CORP.,

*Petitioner*,

—against—

UNITED STATES OF AMERICA,

*Respondent*.

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT (Docket No. 29052)

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT (Docket No. 29052)

Petitioner ROBBINS MEN'S & BOYS' WEAR CORP. prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above case, Docket No. 29052, on August 6, 1964.

### Opinions Below

The District Court for the Southern District of New York (*per* Edward Jordan Dimock, D.J.) rendered summary judgment in favor of the United States, with a memorandum opinion, on June 30, 1964 (R. I-2a), and an order denying reargument, with a supplemental opinion, on July 8, 1964 (R. I-8a). Those opinions are not reported, and are printed in Appendix A, *infra*. In No. 29052, the Court of Appeals for the Second Circuit (*p.c.*) affirmed on August 6, 1964, without opinion. (R. II-13c)

The proceedings in the Court of Appeals and the District Court are captioned: "United States of America, Petitioner-Plaintiff, *against* Certain Land in the Borough of Manhattan, City, County and State of New York *and* 306 Broadway Realty Corp., *et al.*, Defendants." Related and concurrent cases have been decided below in these condemnation proceedings, under Court of Appeals Docket No. 28942. On April 30, 1964, the District Court (*per* Hon. Charles M. Metzner, D.J.) entered an *ex parte* Order of Immediate Possession. On May 21, 1964, the District Court (*per* Hon. Charles H. Tenney, D.J.) denied a motion for stay of dispossess; Judge Tenney's opinion is not reported. On June 2, 1964, the Court of Appeals (*per* Hon. J. Edward Lumbard, Ch.J.) reversed, remanded for trial, and stayed dispossess pending trial; Judge Lumbard's opinion is reported at 332 F. 2d 679, and is printed in Appendix B, *infra*. On remand and after trial, Judge Tenney rendered an order and opinion on August 4, 1964, and a supplemental order and opinion on August 5, 1964; Judge Tenney's opinions are not reported. On August 14, 1964, the Court of Appeals (*p.c.*) affirmed, "for the reasons set forth in Judge Tenney's thorough and well reasoned opinion"; that memorandum is not reported. Those decisions in No. 28942 involve the time of dispossess of the occupants of the realty taken, and presuppose the validity of the taking—the only issue presented in No. 29052 and in this petition for certiorari.

## Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was made and entered August 6, 1964. (R. II-13c) No petition for rehearing was filed. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

## Questions Presented

General Services Administration (GSA), acting for the United States, but lacking statutory approval by the Public Works Committees of Congress, has filed a Complaint and a Declaration of Taking of certain realty as an "addition to" or "enlargement of" a different but adjoining site taken four years earlier by GSA in different Congressionally-approved condemnation proceedings. GSA denies having any plans for the use of the later-condemned site.

1. *Authority*: Does geographic contiguity of the later-condemned site to the earlier-condemned site, *per se* and absent Public Works Committees' approval, authorize GSA alone to effect the later condemnation?

2. *Public Use*: Does geographic contiguity of the later-condemned site to the earlier-condemned site, *per se* and absent any intention of any use, establish a Constitutional public use of the later-condemned site?

## Statutes Involved

The statutes involved are the Public Buildings Act of 1959, P. L. 86-249, 73 Stat. 479, 40 U. S. C. Ch. 12, §§ 601 *et seq.* (approved Sept. 9, 1959), and the Independent Offices Appropriation Act, 1964, P. L. 88-215, 77 Stat. 425, 5 U. S. C. § 630g, note (approved Dec. 19, 1963). The material provisions are printed in Appendix C, *infra*.

## Statement of the Case

On April 30, 1964, General Services Administration (GSA), acting for the United States, instituted land-condemnation proceedings in the District Court for the Southern District of New York, by filing a Complaint and a Declaration of Taking of the "Broadway site", comprising certain land and buildings in downtown Manhattan near Foley Square; most of those buildings front on Broadway and bear street numbers between 306 and 334 Broadway. Petitioner Robbins Men's & Boys' Wear Corp., a retail storekeeper, has been the sole occupant and tenant of the building at 310 Broadway since November 1956.

The Broadway site taken in 1964, is adjacent to the "Foley Square site" taken in 1959-60 by GSA for construction of a new federal office building and a new customs courthouse.[1] The 1959-60 condemnation proceedings —the GSA prospectus submitted to the Public Works Committees (R. I-38a), the Public Works Committees' resolutions of approval, the Complaint, the Declaration of Taking—all fully and timely complied with the Public Buildings Act of 1959,[2] and excluded the Broadway site.

Demolition, excavation, and pile-driving in the Foley Square site undermined the foundations of certain buildings in the Broadway site. Under the construction contract with GSA, the bonded prime contractor had assumed the duty of safeguarding both the Foley Square site and the adjoining buildings. Local law gives land-owners and their

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[1] *United States* v. *Certain Property Located in the Borough of Manhattan, City, County and State of New York, et al.*, S.D.N.Y. Index No. Civ-140-154 (1959). *See* 306 F.2d 439 (2d Cir., 1962, *per* Friendly, J.).

[2] Public Buildings Act of 1959, P.L. 86-249, 73 Stat. 479, 40 U.S.C. Ch. 12, § 601 (approved 9/9/59).

contractors the right to inspect and protect adjacent foundations, correlative to their duty to shore-up and underpin during construction.[3] GSA's contractors had notice of the danger no later than November 1963. Nevertheless, not until April 1964 did GSA's contractors even inspect 320 Broadway, the building principally endangered. Thereupon, construction halted in the Foley Square site while GSA's officials, architects and engineers conferred and solicited bids for shoring-up and underpinning. Without awaiting agreement by its architects and engineers, GSA instituted these condemnation proceedings on April 30, 1964. The "estimated just compensation" stated in the Declaration of Taking and deposited in court by GSA, was $3,512,051 for the entire Broadway site, including $1,523,000 for 320 Broadway, the building alleged by GSA to be in danger of imminent collapse. (R. I-17a)

Petitioner's building, 310 Broadway, is not in danger and will not interfere with construction in the Foley Square site: so Judge Tenney ruled on August 4, 1964. As Judge Lumbard observed, "Of course to the extent that certain fixtures are deemed under the applicable law to constitute real estate the government must pay their reasonable value. [Case cited.] But obviously this may be but a small fraction of the loss which would follow a precipitate expulsion from the premises."[4]

Concurrent with the proceedings before Judge Tenney on the time of dispossess, were the proceedings before Judge Dimock on the validity of GSA's taking of the Broadway site. Petitioner and certain other occupants,

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[3] New York City Administrative Code §§ C26-386.0, C26-387.0, C26-569.0.

[4] *United States* v. *Certain Land etc., et al.*, 332 F.2d 679, at 681-2 (2d Cir., 1964) (Appendix B, *infra*).

in answers (R. I-19a) to GSA's complaint (R. I-9a), alleged lack of authority by GSA for the taking and lack of intended public use of the property taken. GSA moved to strike the answers for legal insufficiency. (R. I-20a) On the return-day, GSA submitted an affidavit by the GSA Administrator alleging that the Appropriations Committees of both Houses of Congress had approved GSA's expenditures for the taking of the Broadway site. (R. I-30a) GSA admits that neither Public Works Committee approved that taking. Petitioner referred to the record before Judge Tenney. Judge Dimock accepted the GSA affidavit, treated the GSA motion as a speaking motion, excluded the record before Judge Tenney, and granted summary judgment in favor of GSA. (R. I-2a) Absent trial, the facts remain peculiarly within the exclusive knowledge of GSA and its employees, consultants, and contractors; therefore, Petitioner necessarily relies on the related but excluded record before Judge Tenney.

## Reasons for Granting the Writ

The Questions Presented involve the interpretation and application of federal condemnation law and the due-process clause, and particularly the Public Buildings Act of 1959.[5] At stake is the protection of the small businessman from the unilateral action of General Services Administration (GSA), a federal agency which here asserts the power to take private property, and thereby to terminate a tenancy and to destroy good-will, without justification to Congress or Courts, and without disclosing to Congress or Courts—indeed without having—any Constitu-

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[5] Public Buildings Act of 1959, P.L. 86-249, 73 Stat. 479, 40 U.S.C. Ch. 12, § 601 (approved 9/9/59) (Appendix C, *infra*).

tionally-requisite intention of public use of the property taken.

On one of the two questions presented—the question relating to GSA's authority—the Second Circuit Court of Appeals has rendered a decision in conflict with a decision of the District of Columbia Court of Appeals in 1962 on the same matter, *viz.*: *Maiatico* v. *United States,* 302 F. 2d 880 (opinion printed in Appendix D, *infra*).

Both questions presented are important and recurrent as GSA serves a growing nation and government. The questions should be, but have not been, settled by this Court. Pre-1959 case-law on delegated authority to condemn, has little or no weight. The decision below is in error and should be reversed.

1. The Public Buildings Act of 1959[6] is a double and tandem delegation of the sovereign power of eminent domain. Congress has undertaken "to centralize" in GSA "responsibility for the housekeeping function of the [federal] executive branch and the care and provision of its general-purpose office, storage and related space requirements."[7] Comprehended are the construction of federal office buildings and courthouses, and the condemnation of sites therefor. Congress has not ceded all such power of eminent domain to GSA alone, nor relied wholly on the Courts to control GSA's exercise of its delegated power after the taking. Congress itself has reserved control of GSA's exercise of its delegated power—before the taking. That control of GSA was delegated to, and was centralized

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[6] Independent Offices Appropriation Act of 1964, P.L. 88-215, 77 Stat. 425, 5 U.S.C. § 630g, note (approved 12/19/63) (Appendix C, *infra*).

[7] Senate Public Works Committee Report No. 694, August 13, 1959, on S. 1654, 86th Cong., 1st Sess. (1959); 2 U.S. Code Cong. & Admin. News, 86th Cong., 1st Sess. (1959), at 2291-2.

in, the Public Works Committees, irrespective of Appropriations Committees or other committees of Congress.

> "In recent years, * * * no orderly or systematic approach to the provision of general-purpose public buildings has been followed by Congress. Enactment of S. 1654 would correct this problem and return to the jurisdiction of this [Public Works] committee responsibility for *authorizing* general-purpose and related classes of public buildings required to accommodate the various activities of the Government. * * *"[8]

The statute itself expresses the requisite of the Public Works Committees' prior authorization of GSA's takings by condemnation.

> "§ 5.(a) The Administrator is authorized to acquire, by * * * condemnation * * *, such lands or interests in lands as he deems necessary for use as sites, or *additions to sites,* for public buildings *authorized to be constructed* or altered under this Act.
>
> "§ 6.(a) * * * he [the Administrator] is authorized to *demolish* the existing building and to use the site on which it is located for the site of the proposed [new] public building, * * *.
>
> (c) Nothing in this section shall be deemed to permit the Administrator to use any land as a site for a public building if such project has not been approved in accordance with section 7.
>
> "7.(a) * * * *no appropriation shall be made to construct any public building or to acquire any building* to be used as a public building involving an expendi-

[8] *Ibid.* (emphasis supplied).

> ture in excess of $100,000, * * *, if such construction, alteration, or acquisition has not been *approved* by resolutions adopted by the *Committee on Public Works* of the Senate and House of Representatives, respectively, * * *. For the purpose of securing consideration of such approval the Administrator shall transmit to Congress a prospectus of the proposed project, including (but not limited to)—
>
> (1) a brief description of the building to be constructed, altered, or acquired under this Act;
>
> (2) the location of the project, and an estimate of the maximum cost of the project; * * *."[9]

2. GSA's recourse to the Appropriations Committees *in lieu of* the Public Works Committees, is precisely what the Public Buildings Act of 1959 prohibited. To escape, both Judge Dimock and GSA rely on a subsequent statute, the Independent Offices Appropriations Act of 1964, and particularly on a "General Provision" thereof which requires Appropriations Committee approval of GSA's expenditures.[10] Yet, that General Provision, in terms, is "subject to the provisions of the Public Buildings Act of 1959"; *i.e.*, Public Works Committee approval is still—and additionally—necessary. Then GSA says that GSA expended "saved funds" derived (via that General Provision) from "Appropriations to [GSA] under the heading 'Construction, Public Buildings Projects' made under *this* Act"—but the Foley Square site and the Broadway site

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[9] Public Buildings Act of 1959, P.L. 86-249, §§ 5, 6, 7; 73 Stat. 479-480; 40 U.S.C. Ch. 12, §§ 604, 605, 606 (approved 9/9/59) (Appendix C, *infra*) (emphasis supplied).

[10] Independent Offices Appropriations Act of 1964, P.L. 88-215, 77 Stat. 425, 5 U.S.C. § 630g, note (approved 12/19/63) (Appendix C, *infra*).

are both conspicuously absent from the list of 35 projects identified under that heading. By contrast, Judge Dimock says that GSA expended "saved funds" derived from omnibus appropriations under the different heading "Sites and Expenses, Public Buildings Projects"—but those appropriations are not referred to in the General Provision relied on. In short, Judge Dimock and GSA have not only disregarded the continuing policy of the Public Buildings Act of 1959; they have also variously disoriented the particular provisions of the Independent Offices Appropriation Act of 1964.

3. Ultimately, GSA's rationale for unilateral authority is contiguity, *per se*. From GSA's power to define the "taking area" of the original Foley Square site in 1959-60, is deduced GSA's supposed authority, at its pleasure and forevermore, to "re-define" that "taking area", and so to add the contiguous Broadway site, without prior leave from, and without even prior disclosure to, the Public Works Committees. As Judge Dimock noted (R. I-4a), GSA's rationale would authorize GSA unilaterally to take the whole of Manhattan Island as an "addition to" or "enlargement of" any site within Manhattan previously taken by GSA with the Public Works Committees' authorization. Yet, "additions to" and "enlargments of" earlier-taken sites are explicitly and repeatedly covered by the Public Buildings Act of 1959 and all the subsequent Independent Offices Appropriations Acts, and treated as identical to the original sites in limiting both GSA's authority and GSA's appropriations.

4. All of GSA's arguments below in this case were raised by GSA in *Maiatico*—and rejected.[11] The one distinction is that the original "taking area" in *Maiatico* was defined by Congress itself by statute, while the original "taking area" in this case was defined by Congress's delegate, GSA itself, in the 59-60 Foley Square condemnation proceedings. The distinction is immaterial. Regardless of who defines the "taking area" of the original site, and how, GSA exceeded the geographic bounds of the original site in both *Maiatico* and this case, and "additions to" and "enlargements of" the original site require new authorization by the Public Works Committees. "Saved funds" may not be spent by GSA for unauthorized purposes. The reasoning of *Maiatico* should be adopted, and the courts below should be reversed, in this case.

5. Like GSA's rationale of unilateral authority, GSA's rationale of "intended public use" is contiguity, *per se*. The Complaint (¶ 3; R. I-9a) alleges that "the land is to be used in connection with the enlargement of a Federal Building site." Judge Dimock's summary judgment treats naked "addition to" or "enlargement of" an earlier-taken site as an "intended public use", without more. But contiguity is only evidentiary of purpose of a taking; it is not purpose itself. The Broadway site has been newly taken in 1964, and must be justified anew. Despite contiguity, the Broadway site may have no intended use relative to the Foley Square site. That involves a question of *fact*: What is GSA's intention in fact, and what is the intended use or purpose in fact? A residuum of judicial review remains in this Constitutional area of due-

[11] *Maiatico* v. *United States*, 302 F.2d 880 (D. C. Cir., 1962, *per* Danaher, J.) (Appendix D, *infra*).

process.[12] GSA has elected to proceed by motion to strike the answers (or for summary judgment), and to conceal its intention and the intended use or purpose. Apart from argument on GSA's hypothetical powers to take property for multifarious uses, the record shows nothing but GSA's investment of "saved funds" in a "land-bank", with no present intention for any use of the land taken. No-use is not an "intended public use"; GSA's taking for no-use is barred by the Constitution and by the Public Buildings Act of 1959. The evidence excluded by Judge Dimock shows the only intended purpose to be GSA's demolition of buildings on the Broadway site at federal cost—a public assumption of the private contractor's liability to safeguard the Foley Square site and to protect adjacent foundations in the Broadway site. GSA admits the "motivation", but denies the "purpose". If GSA is spending over $3,500,000 in federal funds for no-use of the property taken, while incidentally protecting a private contractor and its surety, a federal court can—and should—strike GSA's naked allegation of "intended public use" as sham, and find—as fact—an intended *private* use. At minimum, trial is necessary. Absent judicial review, any taking by GSA would be an "intended public use", *per se;* GSA's complaint would be a tautology; and the Constitutional requirement of "intended public use" for due-process would lose all meaning.

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[12] *See Berman* v. *Parker,* 348 U.S. 26, at 32, 35-36 (1954, *per* Douglas, J.).

## Conclusion

The courts below have sanctioned General Services Administration's flouting the statutory limitation on its authority to take property by condemnation, *viz.*: the prerequisite of authorization by the Public Works Committees of Congress. The courts below have allowed the mere taking of property by General Services Administration as an intended public use, with no proof of the fact. Contiguity, *per se,* of a later-taken site to an earlier-taken site, is the rationale—and is not enough. The Questions Presented involve the interpretation of federal condemnation legislation and Constitutional due-process, and the conflict of decisions in the federal Courts of Appeals. Those questions are important and recurrent, and should be settled by the Supreme Court.

For the reasons set forth above, it is respectfully submitted that this Petition for a Writ of Certiorari to the Second Circuit Court of Appeals should be granted.

Dated: New York, New York
October 23, 1964

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## APPENDIX A

### Opinion Below in No. 29052

MEMORANDUM

DIMOCK, *D.J.*

Five defendants in this condemnation proceeding, Palmer, Masia & Palmer, Fuchsberg & Fuchsberg, Dancker & Sellew, Inc., 308 Broadway Corp., and Robbins Men's & Boys' Wear Corp. attack the proceedings as unauthorized. All five have filed answers and defendant Dancker & Sellew, Inc. has made a motion to dismiss the complaint.

The answers deny the allegation of the complaint that "the land is to be used in connection with the enlargement of a Federal building site". Among them the answers also raise the point that there is no authorization for the use of Government funds for the acquisition.

The Government opposes the motion to dismiss and moves for judgment on the ground that the answers do not constitute a defense. Since the Government's motion is supported by affidavits it will be treated as one for summary judgment. Rule 12c, F. R. Civ. P.

The Government in its moving affidavit alleges, "The complaint in condemnation filed in this action as well as the Declaration of Taking, clearly set forth that the Commissioner, Public Buildings Service, General Services Administration of the United States, has found and determined that the acquisition of said property, described in the Declaration of Taking and complaint, had been selected and is being acquired by the United States 'in connection with the enlargement of a Federal building site and for such other uses as may be authorized by Congress or by Executive Order' ".

*Appendix A*

With some hesitation I read this con amore as being an allegation that the Commissioner has found and determined that the property is being acquired by the United States "in connection with the enlargement of a Federal building site". I feel justified in this liberal construction by the fact that the defendants do not actually controvert the making of such a determination. The point made by defendants is that the property condemned is not actually being acquired for the enlargement of a Federal building site but rather to bail out a private contractor. The property sought to be acquired immediately adjoins the site taken for a Customs Court building and Federal office building. The original site was bounded on three sides by Duane Street, Lafayette Street and Worth Street. The property sought to be acquired adjoins it directly on the west and is bounded by Duane Street, Broadway and Worth Street.

The authority for the current acquisition is alleged to be found in section 5(a) of P.L. 86-249, 73 Stat. 479, approved September 9, 1959, which provides "The Administrator is authorized to acquire, by purchase, condemnation, donation, exchange, or otherwise, such lands or interests in lands as he deems necessary for use as sites, or additions to sites, for public buildings authorized to be constructed or altered under this Act."

It would be hard to imagine a situation where a piece of property was more clearly an addition to a site from a physical standpoint. While it probably is true that the words of the statute would not cover a taking the whole of Manhattan Island as an addition to the Customs Court site, the facts here raise no such question.

The defendants' allegation that the purpose of the acquisition is not for the enlargement of the Customs Court

site but, rather, to bail out a private contractor, is based upon the fact that the Government ordered an evacuation of the buildings on the property sought to be acquired on the ground that occupancy was dangerous. Defendants allege that the operations of the contractor on the Customs Court site caused the condition which the Government regarded as dangerous and that the acquisition is consequently for his benefit.

The court is not concerned with the motives of the Government in making the acquisition. Defendants' position involves the assumption that the contractor's operation on the Customs Court site required the enlargement of the property originally acquired. It makes no difference whose fault that was. The Government's obligation of lateral support was an absolute one. Levine v. City of New York, 249 App. Div. 625. When the Customs Court site became untenable because of the Government's occupancy unless adjoining land was acquired the acquisition of the adjoining land constituted an enlargement of the site.

The phraseology of the Declaration of Taking to the effect that the property had been selected for acquisition by the United States "in connection with" the enlargement of the Federal building site is a little troublesome since the statutory authority is for acquisition "for use as sites, or additions to sites". My conclusion is, however, that the use of the substitute words "in connection with" does not depart from the meaning of the statute. As long as "the land is to be used in connection with the enlargement of a Federal building site" its taking is bound to be "for use as" and "addition" to the site. I cannot think of a use "in connection with" enlargement of a site that would not qualify as a use "for" an addition to the site.

*Appendix A*

Despite the fact that funds to pay for the property sought to be acquired in an amount alleged to be the equivalent of its value have been deposited in court, defendants make the point that there was no valid appropriation for payment for the property.

It is said that the approval of the Committees on Public Works of the Senate and House of Representatives respectively for an appropriation in excess of $100,000 is required by section 7(a) of P. L. 86-249. That section applies only to appropriations for buildings and is inapplicable to an appropriation for an addition to a building site.

The requirements of law for payment in a case such as this have been here met. The Government has produced an affidavit of the Administrator of General Services who swears that, as required by the General Provisions, Title I, Independent Offices Appropriation Act, 1964 P. L. 88-215, 77 Stat. 433, approved December 19, 1963, the respective Committees on Appropriations of the Senate and House of Representatives had informed him that expenditure of funds for the property sought to be acquired had been approved. The act cited by the Administrator appropriates a fund for "expenses necessary in connection with the construction of public building projects not otherwise provided for" and the general provisions thereof direct "that nothing herein shall authorize an expenditure of funds for acquisition extension or conversion or construction without the approval of the Committee on Appropriations of the Senate and House of Representatives". Nothing more is required.

There is no issue of fact in the case.

Upon its motion, summary judgment is awarded to the Government as against defendants Palmer, Masia &

*Appendix A*

Palmer, Fuchsberg & Fuchsberg, Dancker & Sellew, Inc., 308 Broadway Corp., and Robbins Men's & Boys' Wear Corp.

The motion of Dancker & Sellew, Inc., insofar as it seeks a dismissal of the action, is denied.

Dated: June 30, 1964

E J Dimock
*United States District Judge*

[Memorandum Opinion on Motion for Reargument:]

July 8, 1964

On this motion for reargument the affidavits make only one allegation that was not before the court at the time of the original decision. That allegation is that a conference on April 29, 1964, where all persons were sworn to secrecy and where safety was being discussed, was stopped with the statement by an architect that an arrangement had been made that night to straighten the whole matter. Accepting this allegation as true, it has no tendency toward empowering this court to reverse the determination of the Administrator that the adjoining property be acquired. There still would be no issue of fact. The motion for reargument is denied.

E. J. Dimock

[*United States Court of Appeals for the Second Circuit, No. 29052; argued and decided, p.c., August 6, 1964: Affirmed without opinion.*]

## APPENDIX B

### Related Opinion Below in No. 28942

(Argued May 27, 1964—Decided June 2, 1964)

Before LUMBARD, Chief Judge, and WATERMAN and HAYS, Circuit Judges.

LUMBARD, Chief Judge:

On April 30, 1964, by ex parte order of the United States District Court for the Southern District of New York, the United States government condemned certain properties on the west side of Foley Square in New York City for the erection of a United States office building. The defendants, tenants occupying the buildings so taken, appeal from an order of the Southern District which denied their applications for modification of the previous order with respect to the terms and conditions of the government's taking possession, 40 U.S.C. § 258a, to stay the government from taking immediate possession and to permit the defendants some time within which to vacate the premises and to find other quarters.

Having taken immediate appeals, the tenants applied to us on May 25 for a stay pending hearing of their appeals, and we heard the appeals on May 27, the government having agreed that no action would be taken in the interim, at which time we granted a stay pending our decision.

[1] We hold that appeal lies from the district court's denial of the application to restrain the government from taking possession at any time after May 9. The tenants' rights derive from 40 U.S.C. § 258a, which provides that

"the court shall have power to fix the time within which and the terms upon which the parties in possession shall be required to surrender possession" to the government. As such, these rights are separable from, yet collateral to, the rights asserted in the main condemnation action. No compelling reason thus exists for deferring appellate review until the entire case has been adjudicated. The occupants' rights would be rendered moot and beyond the power of any court to rectify if they could not be heard at once and before they have been dispossessed. See Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 69 S.Ct. 1221, 93 L. Ed. 1528 (1949).

On April 22 the General Services Administration, under whose supervision the clearing of adjacent land taken in earlier proceedings, see 306 F.2d 439 (2 Cir. 1962), was going forward, directed that all work should cease because examinations and measurements made by architects and engineers over a period of many weeks indicated that four of the eleven buildings involved in the present taking (apparently all that were tested) had settled from 1¾ to 2 inches and had suffered lateral movement from 13/16 of an inch to 1⅜ inches, except that the 16-story building at 320 Broadway had lateral movement of from 3⅝ inches to 7¾ inches. In the view of the government's experts there was serious danger to life, limb and property if all the buildings were not promptly vacated. Eight days later, on April 30, the government commenced this proceeding to condemn the eleven buildings and the land on which they rested. It filed its notices of taking and secured an ex parte order of the district court which granted the government the right to immediate possession of the property.

*Appendix B*

The government next took immediate steps to notify the tenants, and notices were recived by them on Monday, May 4, which stated that they must vacate the premises as soon as possible, and in any event no later than midnight, May 9. The tenants thereupon secured orders to show cause why the government should not be stayed from evicting them forthwith, and the matter came on to be heard by the district court on May 11 on affidavits submitted by the government and the tenants.

On behalf of the government an affidavit was submitted by Alfred Easton Poor, an architect, senior partner of the Office of Alfred Easton Poor and the coordinating partner of the joint venture who are the architect/engineers for the federal office building involved. Poor stated that periodic measurements had been made by a licensed surveyor of the settlement of the buildings adjacent to the construction project and that tests were made of the foundation of at least one large building on the adjacent property. The results indicated an accelerated rate of settlement and lateral movement of the adjacent buildings. Poor concluded that the present condition of the adjacent buildings "presents a possible hazard to life, limb and property. This is true even though no further construction work is undertaken and the hazard extends to all the buildings adjacent to the construction site irrespective of their present condition of movement." Poor's conclusions were concurred in by affidavits submitted by William H. Mueser, senior partner in a firm of consulting engineers specializing in foundations for buildings, bridges, and site and soil investigations, and by Fred N. Severud, senior partner in the consulting engineering firm who are the structural engineers for the federal office building.

*Appendix B*

The tenants submitted affidavits of William Shore, an engineer, who stated that he had examined the property, that no emergency existed and that the buildings were safe, and of Benjamin Leavin, an engineer, who concluded, also after examination of the property, that "there is absolutely no possibility of any collapse while no further construction and foundation work goes on."

From what was said at the argument, there had been no further settlement or lateral movement of the buildings from May 6 to May 27 and, so far as we know, that remains true today.

The government further stated that each day's delay caused a loss of approximately $8,000. At the argument the tenants asked for a hearing of the government's experts, a chance to engage further experts of their own, and the appointment of an independent expert to examine the properties and report to the court.

Judge Tenney did not hear witnesses or appoint an independent expert and, in his opinion denying the applications, said that because of the allegations regarding the possible dire consequences of delay in the vacating of the buildings and the placing of the government in possession the court should not attempt to substitute its judgment for that of the parties responsible.

[2] At the argument of this appeal, government counsel conceded that he could cite no case in which the government had ever sought to oust the occupants of condemned premises on such short notice as it had given the occupants of these buildings. Cf. United States v. 6576.27 Acres, etc., 77 F.Supp. 244 (D.N.D.1948). There can be no doubt that to require the many private businesses now housed in these buildings to move out within a few days

would cause grave dislocation to them, their customers, and their many employees. For example, Addressing Machine and Equipment Company, which occupies two of the buildings here involved, alleges that it would take at least six months to locate adequate premises to accommodate its machinery, equipment, and an inventory valued at more than $1 million, in addition to moving expenses estimated at at least $150,000. Such a sudden dislocation would inevitably result in considerable irreparable financial loss, inasmuch as the government could not be held to reimburse the tenants for many of the emergency expenses as well as the expenses of moving to new premises. Of course to the extent that certain fixtures are deemed under the applicable law to constitute real estate the government must pay their reasonable value. See United States v. Certain Property, 306 F.2d 439 (2 Cir. 1962). But obviously this may be but a small fraction of the loss which would follow a precipitate expulsion from the premises. Moreover, while the government may well have acted as prudently and expeditiously as possible, certainly the occupants are entirely without fault in this matter and are entitled to have any reasonable doubt decided in their favor consistent with the public safety.

[3] On balance, having in mind the probable dangers of the situation, the very grave consequences of hasty action, and the power of the district court to determine the terms and conditions of possession by the government, 40 U.S.C. § 258a, we think the district court should proceed with all speed to hear and examine such expert witnesses as the parties concerned may wish to call, and also any public officers or employees who are concerned with the public safety and condition of buildings. The district court

should further inquire into what, if any, undertakings or other means of assurance may be feasible to save harmless the government, and any contractors or other interested parties, with respect to claims arising out of continued occupancy of the premises, so that such continued occupancy may be conditioned on terms reasonable to the government, including payments in lieu of rent for the period since April 30 and for any period during which the court may permit continued occupancy by any of the tenants.

Meanwhile and until the district court has made its determination, following a further hearing, we stay the government from taking any steps to oust any of the tenants from possession, provided, of course, that the occupants compensate the government for continued occupancy as the district court may direct.

The case is remanded to the district court for further proceedings consistent with this opinion. We direct our mandate to issue forthwith.

# APPENDIX C

## Text of Statutes Cited

**Public Buildings Act of 1959; P.L. 86-249; 73 Stat. 479; 40 U.S.C. Ch. 12, §§ 601 et seq. (approved Sept. 9, 1959):**

§ 2. No public building shall be constructed except by the Administrator, who shall construct such public building in accordance with this Act.

§ 3. The Administrator is authorized to acquire, by purchase, condemnation, donation, exchange, or otherwise, any building and its site which he determines to be necessary to carry out his duties under this Act.

§ 4. (a) The Administrator is authorized to acquire, by purchase, condemnation, donation, exchange, or otherwise, such lands or interests in lands as he deems necessary for use as sites, or additions to sites, for public buildings authorized to be constructed or altered under this Act.

* * * * *

(c) Whenever the Administrator is to acquire a site under this section, he may if he deems it necessary, solicit by public advertisement, proposals for the sale, donation, or exchange of real property to the United States to be used as such site. In selecting a site under this section the Administrator (with the concurrence of the Postmaster General if the public building to be constructed thereon is to be used in whole or in part for post office purposes) is authorized to select such site as in his estimation is the most advantageous to the United States, all factors considered, and to acquire such site without regard to title III of the Federal Property and Administrative Services Act of 1949, as amended.

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§ 6. (a) Whenever the Administrator deems it to be in the best interest of the United States to construct a new public building to take the place of an existing public building, he is authorized to demolish the existing building and to use the site on which it is located for the site of the proposed public building, or, if in his judgment it is more advantageous to construct such public building on a different site in the same city, he is authorized to exchange such building and site, or such site, for another site, or to sell such building and site in accordance with the provisions of the Federal Property and Administrative Services Act of 1949, as amended.

(b) Whenever the Administrator determines that a site acquired for the construction of a public building is not suitable for that purpose, he is authorized to exchange such site for another, or to sell it in accordance with the provisions of the Federal Property and Administrative Services Act of 1949, as amended.

(c) Nothing in this section shall be deemed to permit the Administrator to use any land as a site for a public building if such project has not been approved in accordance with section 7.

§ 7. (a) In order to insure the equitable distribution of public buildings throughout the United States with due regard for the comparative urgency of need for such buildings, except as provided in section 4, no appropriation shall be made to construct any public building or to acquire any building to be used as a public building involving an expenditure in excess of $100,000, and no appropriation shall be made to alter any public building in-

volving an expenditure in excess of $200,000, if such construction, alteration, or acquisition has not been approved by resolutions adopted by the Committee on Public Works of the Senate and House of Representatives, respectively, and such approval has not been rescinded as provided in subsection (c) of this section. For the purpose of securing consideration of such approval the Administrator shall transmit to Congress a prospectus of the proposed project, including (but not limited to)—

(1) a brief description of the building to be constructed, altered, or acquired under this Act;

(2) the location of the project, and an estimate of the maximum cost of the project;

(3) a comprehensive plan for providing space for all Government officers and employees in the locality of the proposed project, having due regard for suitable space which may continue to be available in existing Government-owned buildings and in rented buildings;

(4) a statement by the Administrator that suitable space owned by the Government is not available and that suitable rental space is not available at a price commensurate with that to be afforded through the proposed action; and

(5) a statement of rents and other housing costs currently being paid by the Government for Federal agencies to be housed in the building to be constructed, altered, or acquired.

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(b) The estimated maximum cost of any project approved under this section as set forth in any prospectus may be increased by an amount equal to the percentage increase, if any, as determined by the Administrator, in construction or alteration costs, as the case may be, from the date of transmittal of such prospectus to Congress, but in no event shall the increase authorized by this subsection exceed 10 per centum of such estimated maximum cost.

• • • • •

*Appendix C*

**Independent Offices Appropriation Act of 1964; P.L. 88-215; 77 Stat. 425, at 432-434; 5 U.S.C. § 630g, note (approved Dec. 19, 1963):**

GENERAL SERVICES ADMINISTRATION

* * * * *

REPAIR AND IMPROVEMENT OF PUBLIC BUILDINGS

For expenses, not otherwise provided for, necessary to alter public buildings and to acquire additions to sites pursuant to the Public Buildings Act of 1959 (73 Stat. 479) and to alter other Federally-owned buildings and to acquire additions to sites thereof, including grounds, approaches and appurtenances, wharves and piers, together with the necessary dredging adjacent thereto; and care and safeguarding of sites; preliminary planning of projects by contract or otherwise; maintenance, preservation, demolition, and equipment; $75,000,000, to remain available until expended: *Provided*, That for the purposes of this appropriation, buildings constructed pursuant to the Public Buildings Purchase Contract Act of 1954 (40 U.S.C. 356) and the Post Office Department Property Act of 1954 (39 U.S.C. 2104 et seq.), and buildings under the control of another department or agency where alteration of such buildings is required in connection with the moving of such other department or agency from buildings then, or thereafter to be, under the control of General Services Administration shall be considered to be public buildings.

CONSTRUCTION, PUBLIC BUILDINGS PROJECTS

For an additional amount for expenses, not otherwise provided for, necessary to construct public buildings projects and alter public buildings by extension or conversion where

the estimated cost for a project is in excess of $200,000 pursuant to the Public Buildings Act of 1959 (73 Stat. 479), including equipment for such buildings, $157,600,800, and not to exceed $500,000 of this amount shall be available to the Administrator for construction of small public buildings outside the District of Columbia as the Administrator approves and deems necessary, all to remain available until expended: *Provided,* That the foregoing amount shall be available for public buildings projects at locations and at maximum construction improvement costs (excluding funds for sites and expenses) as follows:

[*35 sites identified, all outside New York*]

SITES AND EXPENSES, PUBLIC BUILDINGS PROJECTS

For an additional amount for expenses necessary in connection with the construction of public buildings projects not otherwise provided for, as specified under this head in the Independent Offices Appropriation Acts of 1959 and 1960, including preliminary planning of public buildings projects by contract or otherwise, $40,000,000, to remain available until expended.

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GENERAL PROVISIONS

* * * * *

Appropriations to the General Services Administration under the heading "Construction, Public Buildings Projects" made in this Act shall be available, subject to the provisions of the Public Buildings Act of 1959 for (1) acquisition of buildings and sites thereof by purchase, condemnation, or otherwse, including prepayment of purchase

contracts, (2) extension or conversion of Government-owned buildings, and (3) construction of new buildings, in addition to those set forth under that appropriation: *Provided,* That nothing herein shall authorize an expenditure of funds for acquisition, extension or conversion, or construction without the approval of the Committees on Appropriations of the Senate and House of Representatives.

* * * * *

# APPENDIX D

## Conflicting Opinion

**Maiatico v. United States, 302 F.2d 880 (D.C. Cir., 1962)**

Before EDGERTON, WASHINGTON and DANAHER, Circuit Judges.

DANAHER, *Circuit Judge.*

The Government on January 4, 1961 filed in the District Court its complaint for the taking of certain property in the District of Columbia under power of eminent domain and for the ascertainment and award of just compensation for that taking. At the same time, the Administrator of General Services filed a Declaration of Taking, and deposited in the Registry of the District Court the sum of $9,900,000 as estimated just compensation. The Government's motion for surrender of possession of the property was granted, and appellants' challenge to the Government's claim of right to condemn was rejected. As to such rulings, another division of this court allowed an interlocutory appeal which had been certified pursuant to 28 U.S.C. § 1292(b).[1]

The property in question, located at 1717 H Street, N. W. in the District of Columbia, is a large, eleven story, modern office building known as the Matomic Building,

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[1] This court's order of June 30, 1961 in pertinent part reads:

"Ordered by the court that an appeal from the order of the District Court entered May 10, 1961, denying defendant's motion to dismiss is allowed and that an appeal from the order of the District Court entered herein May 10, 1961 denying defendant's motion for reconsideration of order of March 10, 1961, and granting plaintiff's motion for surrender of possession and motion to strike the defendant's answer, is allowed."

We omit reference to earlier, intermediate procedural steps, not now relevant.

which the Administrator of General Services specified is to be used for the housing of federal agencies. In the District Court, it was conceded by the Government that the premises are not within the "taking area" as defined in the Public Buildings Act of 1959, 73 Stat. 479, 481,[2] which, the Government argued, does not apply to the acquisition of the Matomic Building. The Government agreed that if General Services "were going to build a building within those boundaries, a specific authorization would be necessary. We are not building a building."

Appellants countered that the Government had no authority to acquire the building for it had not obtained approval so to do "from the Committees on Public Works of the Senate and House of Representatives as it is required to do by the Independent Offices Appropriation Act, 1961, and the Public Buildings Act of 1959, 40 U.S.C.A. § 606(a)."[3]

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[2] Sec. 8(a), 40 U.S.C.A. § 607(a) in pertinent part reads:

"In carrying out his duties under this Act, the Administrator shall acquire real property within the District of Columbia exclusively within (1) the area bounded on E Street, New York Avenue, and Pennsylvania Avenue Northwest, on the North; Delaware Avenue Southwest on the east; Virginia Avenue and Maryland Avenue projected in a straight line to the Tidal Basin, Southwest, on the south; and the Potomac River on the west * * *."

[3] Sec. 7(a), 73 Stat. 480, 40 U.S.C.A. § 606(a), provides in pertinent part:

"In order to insure the equitable distribution of public buildings throughout the United States with due regard for the comparative urgency of need for such buildings, except as provided in section 4, no appropriation shall be made * * * to acquire any building to be used as a public building involving an expenditure in excess of $100,000 * * * if such * * * acquisition has not been approved by resolutions adopted by the Committee on Public Works of the Senate and House of Representatives, respectively * * *."

[Sec. 4 applies only to alteration of public buildings or the acquisition of lands necessary to carry out an alteration.]

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The Government concedes that the respective Senate and House Committees on Public Works had held no hearings with reference to the acquisition of the Matomic Building and had not adopted resolutions approving its acquisition. The Government argues that such steps and such approval were not required, again asserting that the provisions of the Public Buildings Act of 1959 do not here apply. We turn accordingly to consideration of that Act and its possible applicability to our problem.

Congress passed the Public Buildings Act of 1959[4] with the "primary purpose" [5] of providing a "basic statute which would vest in the Administrator of General Services authority and responsibility for acquiring * * * public buildings [as defined in the Act] and acquiring the necessary sites * * * in connection therewith * * *." [6] It was noted that over a period of 55 years legislation had become a "patchwork." The Administrator had been by-passed by various agencies. A thorough study had been made of various enactments which had previously pointed up the congressional plan, culminating in the congressional conclusion that authority in the public buildings field, with certain exceptions not pertinent here, should be centralized in the General Services Administration.

The Act authorized the Administrator to acquire any building and its site by condemnation or otherwise, in order to carry out the purposes of the Act, but strictly in accordance with its provisions. It was provided that no appropriation be made to acquire any building involving an expenditure in excess of $100,000 unless the acquisition

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[4] 73 Stat. 479, 40 J.S.C.A. §§ 601-615.

[5] H.R. Rep. No. 557, 86th Cong., 1st Sess. 2 (1959).

[6] Ibid.

be approved by resolutions adopted by the respective Committees on Public Works of the House and Senate.[7] The Administrator was required to transmit to the Congress and secure advance approval of a prospectus of each proposed project including (1) a description of the building to be acquired, (2) its location and estimated cost and other details,[8] and even as to an *approved* project, the Act imposed a strict limitation upon a possible increase of not to exceed 10% above the estimated maximum cost. In particular, as applicable to the District of Columbia, the Administrator was commanded to acquire real property *exclusively* within the area defined in the Act,[9] and conformably generally to the L'Enfant plan for the "Federal City."

It will be seen that the Administrator of G. S. A. was made the executor of the congressional plan, with wide powers as to any project, once it be approved by the standing Committees on Public Works, but subject to their firm control.

Against that background of such recent legislation, especially as applicable to the District of Columbia, the House received the bill which was to become the Independent Offices Appropriation Act, 1961. Under the heading "General Services Administration," funds had been provided for 18 construction projects and 2 major renovations in accordance with prospectuses already approved by the

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[7] Supra note 3.

[8] Including a "statement by the Administrator that neither federally owned space is available nor rental space is available at a price commensurate with that to be afforded by the proposed action * * *." H.R. Rep. No. 557, supra note 5, p. 9.

[9] Supra note 2. And see D.C. Code §§ 16-619—16-644 (1961) governing the acquisition of land in the District of Columbia for use of the United States.

House Committee on Public Works. Three projects for the District of Columbia included in the bill had not received advance approval from that standing committee. A point of order raised against those projects, calling for some $65,000,000, was sustained, and they were deleted. The bill then went to the Senate.

The Administrator proposed to the Senate Subcommittee on Appropriations an amendment which would allow for four District of Columbia projects, Federal Office Building Eight, $15,105,000, FOB Nine, $20,031,100, FOB Ten, $38,326,500 and a Court of Claims building, $6,375,000. He recommended in order to avoid further points of order that Congress recognize the principle that it "can appropriate funds in advance of the approval of projects by its Committees on Public Works, notwithstanding the provision of section 7(a) [supra note 3] of the Public Buildings Act of 1959. Further, that by limiting the use of any funds so appropriated to projects thereafter approved by the said committees, it can achieve the significant purpose of the cited section 7(a)." [10]

The bill was thereupon amended. As amended, and including the four District of Columbia projects, the pertinent portion of the Act before us reads:

"GENERAL SERVICES ADMINISTRATION

* * * * *

"CONSTRUCTION, PUBLIC BUILDINGS PROJECTS

"For an additional amount of expenses, not otherwise provided for, necessary to *construct* public build-

[10] Hearings Before the Subcommittee of the Committee on Appropriations, Senate, 86th Cong., 2d Sess., "Independent Offices Appropriation, 1961," p. 153 (1960).

> ings projects and *alter* public buildings by extension or conversion where the estimated cost for a project is in excess of $200,000 *pursuant to the Public Buildings Act of 1959* (73 Stat. 479), including equipment for such buildings, $165,441,000, to remain available until expended: *Provided*, That the *foregoing amount* shall be available *for public buildings projects, subject to approval of any such project by resolutions adopted by the Committee on Public Works of the Senate and House of Representatives, respectively,* at locations and at maximum construction improvement costs (excluding funds for sites and expenses) as follows:
>
> [Then follows a list of the included projects.]" 74 Stat. 431. (Emphasis added.)

Thus Congress appropriated $165,441,000 to be available for "public buildings projects," but subject to approval of "any such project" by the respective standing committees. Fully recognized and incorporated by reference were the provisions of the Public Buildings Act of 1959.[11] Only in accordance with its terms was the appropriated amount made available to General Services Administration. From the same Act the Administrator derived his duty and authority to expend the fund so appropriated.

[1] The Government tells us on brief: "It is, of course, the 1961 appropriation on which the United States relies for its authority to take the building at 1717 H Street, N. W." We find no evidence that the Matomic Building acquisition was ever approved by the standing Committees on Public Works. We fail to find that the Administrator

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[11] Supra notes 2 and 3.

submitted to those committees the prospectus called for by the Public Buildings Act. The premises are outside the "taking area" defined in the Act. In short there is apparent no compliance with that Act or with the language of the appropriation to which the Government points and upon which it relies. The appropriating language provides an amount "necessary to construct public buildings projects and alter public buildings," nothing else. The specific projects are itemized to show their respective "maximum construction improvement costs (excluding funds for sites and expenses)." The Matomic Building is not listed. Four other District of Columbia projects are. The 1961 Appropriation Act does not sustain the Government's position.

[2] The Government says that the appropriation to *construct* and *alter* public buildings yielded certain "saved funds." Questioned during argument, Government counsel conceded that if the stated cost of each project had simply been overestimated in the Administrator's request, the surplus funds would be classified as "saved." [12] Even so, the appropriation would not on that account be available without congressional approval to condemn the Matomic Building. Granting that the Administrator even under the Public Buildings Act of 1959 has been accorded great latitude, he still must comply with the Appropriation Act. The mere fact that some balance remains from funds appro-

[12] If we were to assume that the maximum construction improvement cost had been overstated in each instance by 20%, there would have remained available to the General Services Administration the amount of $33,088,200. It is to such "saved funds" the Government now points as the source upon which it would draw for the $9,900,000 deposited in the Registry of the District Court in this case, to provide just compensation for the owners of the Matomic Building.

priated for one purpose gives him no authority to expend that balance for an unauthorized purpose.

Lacking other authorization to acquire the Matomic Building or an appropriation allocable to provide just compensation for the owner, having gone outside the "taking area" within which his "exclusive" authority to acquire sites in the District of Columbia had been confined, it is argued on brief that the Administrator nevertheless had been invested with a "large amount of administrative discretion." It is claimed that funds made available to G. S. A., appropriated for public buildings projects, each of which required the approval of the standing committees, might, without such approval, be utilized "to procure office buildings [the Government] was renting anywhere in the United States for occupancy of relatively permanent establishments of the Government," upon determination by G. S. A. that such acquisition "would be more economical than renting and less expensive for the Government than construction of new buildings." The Supplemental Appropriation language discloses no such limitation or statement of purpose that the Administrator, when acquiring buildings, condemn only those already under rental. Surely if Congress intended the Administrator to possess the vast discretion now asserted, it could clearly have said so. We find no evidence that any agency had previously asserted or been accorded such power.

Discretion exercised to permit such acquisitions would thus be unrestricted, freed from the limitations in all other respects applicable to public buildings projects which had been imposed by the Public Buildings Act of 1959 and by the Appropriation Act itself. Not in amount, not in purpose, not in the area of permitted acquisition or other-

wise would there be a limitation upon the Administrator, if that argument be accepted. As predicate for this position the Government points to language in the Second Supplemental Appropriation Act, 1961,[13] which reads:

> "GENERAL PROVISION
>
> "The second paragraph under the heading 'General Services Administration', subhead 'General Provisions,' in the Independent Offices Appropriation Act, 1961, is amended to read as follows:
>
> " 'Appropriations under the heading "Construction, Public Buildings Projects" shall be available for (1) acquisition of buildings and sites thereof by purchase, condemnation, or otherwise, including prepayment of purchase contracts, (2) extension or conversion of Government-owned buildings, and (3) construction of projects for new public buildings approved pursuant to the Public Buildings Act of 1959.' "

Were we to accept the Government's contention, the foregoing text discloses, when read in connection with the 1961 Appropriation Act, that $165,441,000 would thus be said to be "available," without reference to or approval by the standing committees of the House and Senate as to any of the public buildings projects, and without reference to any other statutory requirement imposed by Congress.

The foregoing provision supplants a general provision in the Independent Offices Appropriation Act, 1961, which had read:

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[13] 74 Stat. 821, 826.

*Appendix D*

"Appropriations under the head 'Construction, Public Buildings Projects' shall be available for acquisition of buildings and sites thereof by purchase, condemnation or otherwise, including prepayment of purchase contracts, or for *other approved* projects outside the District of Columbia." [14] Emphasis added.)

When that provision was deleted and the substituted language[15] was inserted in the Second Supplemental Appropriation Act, the House Committee on Appropriations had reported only that "the amendment will enable [the Administrator] to use savings realized in the construction of public buildings to convert and remodel existing Government-owned facilities which from time to time become available for other Federal use or dispositions as surplus property and which are economically adaptable for general purpose Federal space requirements." [16]

[3–5] The Government would have us say that the general provision of the Second Supplemental Appropriation Act supplants the limitations of the Public Buildings Act of 1959 and the Appropriation Act which had so carefully been linked to the former. Carried to its logical conclusion, the Government's construction would sweep away all pre-existing requirements. Any such inversion of the pur-

[14] 74 Stat. 434.

[15] Supra text and note 13.

[16] H.R. Rep. No. 2166, 86th Cong., 2d Sess. 4, 5 (1960). The Congress thus was told that the amendment granted permission to use "saved" funds only "to convert and remodel existing Government-owned facilities." The Senate committee's report is silent on the subject. We have not been cited to evidence in hearings on the Second Supplemental Appropriation Act, 1961, which might support the language of the House report, and our research has disclosed none.

pose of Congress would be in direct conflict with the governing principle to be applied here. "However inclusive may be the general language of a statute, it 'will not be held to apply to a matter specifically dealt with in another part of the same enactment. • • • Specific terms prevail over the general in the same or another statute which otherwise might be controlling.' Ginsberg & Sons v. Popkin, 285 U.S. 204, 208 [52 S.Ct. 322, 76 L.Ed. 704]." [17] The general provision, at least as applicable to the acquisition of property in the District of Columbia, can not be seen to repeal the special legislation which Congress with great care had specified as governing here. "When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode." [18] It is our duty whenever possible to reconcile provisions of varying statutes when and to the extent that conflict may appear.[19] We can not accept the proposition that the general provision in the Supplemental Act repealed—either directly or by implication—the specific provisions of the Appropriation Act as geared to the Public Buildings Act of 1959.

Cases[20] cited by the Government do not support the broad sweep now asserted, for in each of them pre-existing

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[17] MacEvoy Co. v. United States, 322 U. S. 102, 107, 64 S. Ct. 890, 894, 88 L. Ed. 1163 (1944); cf. Fourco Glass Co. v. Transmirra Products Corp., 353 U. S. 222, 228, 229, 77 S. Ct. 787, 1 L. Ed. 2d 786 (1957).

[18] Botany Worsted Mills v. United States, 278 U. S. 282, 289, 49 S. Ct. 129, 132, 73 L. Ed. 379 (1929); cf. American Security & Trust Co. v. Commissioners of Dist. of Columbia, 224 U.S. 491, 495, 32 S. Ct. 553, 56 L. Ed. 856 (1912).

[19] Tri-State Motor Corporation v. Standard Steel Car Co., 51 App. D.C. 109, 110, 111, 276 Fed. 631, 632, 633 (1921).

[20] Ivanhoe Irr. Dist. v. McCracken, 357 U.S. 275, 293, 78 S. Ct. 1174, 2 L. Ed. 2d 1313 (1958); Seneca Nation of Indians v. Brucker, 104

authorization by Congress may be perceived. All antedated the Public Buildings Act of 1959, and in any event, the property involved was not outside a limited and carefully defined "taking area" as is here the situation.

[6] Nothing we have said is in derogation of the vast and admitted power of the Government for its own sovereign purposes to appropriate private property,[21] so long as the owner is awarded "that just compensation which the Constitution requires." [22] Despite appellants' allegations that the taking is unnecessary, it is not for us to determine whether or not a particular project be desirable.[23] That is within the power of the Congress,[24] however, subject to the right of the owners "to challenge the validity of the taking for departure from the statutory limits." [25]

That challenge has here been considered with great care. It is our conclusion that the taking was not within the area from which "exclusively" such acquisitions were required to be made. Since Congress has not been shown to have authorized the present taking of the Matomic Build-

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U.S. App. D.C. 315, 262 F. 2d 27 (1958), cert. denied 360 U.S. 909, 79 S. Ct. 1294, 3 L. Ed. 2d 1260 (1959); United States v. Kennedy, 278 F. 2d 121 (9 Cir. 1960); United States v. Advertising Checking Bureau, 204 F. 2d 770 (7 Cir. 1953); Polson Logging Co. v. United States, 160 F. 2d 712 (9 Cir. 1947); United States v. Threlkeld, 72 F. 2d 464 (10 Cir.), cert. denied 293 U.S. 620, 55 S. Ct. 215, 79 L. Ed. 708 (1934).

[21] United States v. Carmack, 329 U.S. 230, 236, 67 S. Ct. 252, 91 L. Ed. 209 (1946).

[22] United States ex rel. T.V.A. v. Welch, 327 U.S. 546, 555, 66 S. Ct. 715, 719, 90 L. Ed. 843 (1946).

[23] Berman v. Parker, 348 U.S. 26, 33, 75 S. Ct. 98, 99 L. Ed. 27 (1954).

[24] Ibid.

[25] Catlin v. United States, 324 U.S. 220, 240, 65 S. Ct. 631, 637, 89 L. Ed. 911 (1945); Berman v. Parker, supra note 23, 348 U.S. at 35, 36, 75 S. Ct. 98.

ing, the District Court erred in not granting the appellants' motion to dismiss the complaint. The order will be reversed. Since by consent of the parties the fund pursuant to order of the court has already been paid out, it seems to us desirable to delay the issuance of our mandate for a period of thirty days following the entry of our judgment.

Our order will be prepared conformably to the views herein expressed.

Reversed.

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| Public Buildings Act of 1959: | |
| Section 5(a), 73 Stat. 479, 40 U.S.C., Supp. V, 604(a) | 2, 6, 7 |
| Section 7(a), 73 Stat. 480, 40 U.S.C., Supp. V, 606 | 2, 6, 7 |
| Independent Offices Appropriation Act of 1962, 75 Stat. 342, 349 | 3, 6 |




758-051—64

# In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 631

ROBBINS MEN'S & BOYS' WEAR CORP., PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

### OPINION BELOW

The court of appeals did not write an opinion in this case. The opinion of the district court, which was affirmed by the court of appeals, is not reported (Pet. App. A, pp. 1a–5a).

### JURISDICTION

The judgment of the court of appeals was entered on August 6, 1964. The petition for a writ of certiorari was filed on October 27, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTION PRESENTED

Whether the General Services Administration has authority to condemn additional land for a public building site for the purpose of razing the buildings on that land to remove the danger of their collapse caused by the government's construction activities.

## STATUTES INVOLVED

Section 5(a) of the Public Buildings Act of 1959, 73 Stat. 479, provides:

> The Administrator is authorized to acquire, by purchase, condemnation, donation, exchange, or otherwise, such lands or interests in lands as he deems necessary for use as sites, or additions to sites, for public buildings authorized to be constructed or altered under this Act.

Section 7(a) of the Public Buildings Act of 1959, 73 Stat. 480, provides:

> In order to insure the equitable distribution of public buildings throughout the United States with due regard for the comparative urgency of need for such buildings, except as provided in section 4, no appropriation shall be made to construct any public building or to acquire any building to be used as a public building involving an expenditure in excess of $100,000, and no appropriation shall be made to alter any public building involving an expenditure in excess of $200,000, if such construction, alteration, or acquisition has not been approved by resolutions adopted by the Committee on Public Works of the Senate and House of Representatives, respectively, and such approval has not been rescinded as pro-

vided in subsection (c) of this section. For the purpose of securing consideration of such approval the Administrator shall transmit to Congress a prospectus of the proposed project, including (but not limited to)—

(1) a brief description of the building to be constructed, altered, or acquired under this Act;

(2) the location of the project, and an estimate of the maximum cost of the project;

* * * * *

The Independent Offices Appropriation Act of 1962, 75 Stat. 342, 349, provides:

For an additional amount for expenses, not otherwise provided for, necessary to construct public buildings projects and alter public buildings by extension or conversion where the estimated cost for a project is in excess of $200,000 pursuant to the Public Buildings Act of 1959 (73 Stat. 479), including equipment for such buildings, $188,946,500, and not to exceed $500,000 of this amount shall be available to the Administrator for construction of small public buildings outside the District of Columbia as the Administrator approves and deems necessary, all to remain available until expended: *Provided,* That the foregoing amount shall be available for public buildings projects at locations and at maximum construction improvement costs (excluding funds for sites and expenses) as follows:

* * * * *

Customhouse, courthouse, and Federal office building, New York, New York, $59,222,050;

* * * * *

STATEMENT

This condemnation proceeding is for the enlargement of the site for the customs court and federal office building at Foley Square in New York City. Construction of the 41-story building was begun in April 1963. Thereafter, the Government investigated the settlement and lateral movement of adjacent buildings between the building site and Broadway. As construction progressed, instability of some of these buildings, including a 16-story office building at 320 Broadway, became increasingly evident. For this reason, the Administrator of G.S.A. determined to condemn the property between the construction project and Broadway and add it to the site of the customs court and federal building.

A complaint and declaration of taking were filed on April 30, 1964. The district court entered *ex parte* the usual order for immediate possession. From the refusal of the district court to stay its prior order of immediate possession, certain tenants took an appeal. The court of appeals, on June 2, 1964, ordered the district court to hold further hearings on the issue of the necessity for immediate possession. *United States* v. *Certain Land in the Borough of Manhattan (306 Broadway Realty Corp., et al.)*, 332 F. 2d 679 (Pet. App. 6a–11a).

The petitioner (a tenant in one of the buildings) and others, concurrently with the bringing of the first

appeal, raised the issue of the right of the Government to take the property in question. The district court filed an opinion on June 30, 1964, upholding the right of the Government (Pet. App. 1a–5a). On appeal, the decision of the district court was affirmed by the court of appeals *per curiam* on August 6, 1964.

In the meantime, the district court had held hearings on the remand of the first appeal concerning the right of the United States to immediate possession. On August 5 and 6, the district court granted the Government immediate possession of 320 Broadway and possession of all the other property condemned in this proceeding on November 1, 1964. A third appeal was taken from these decisions, and the district court was affirmed *per curiam* on August 14, 1964.

The petitioner was a party only to the litigation concerning the government's right to condemn the property.[1] It seeks review of the decision sustaining this right.

## ARGUMENT

The property involved in the instant case was properly condemned under the authorization granted by Congress to condemn land for the construction of a customs court and federal office building at Foley Square. The statutory authority is found in Section

[1] The petitioner did appeal from an order entered September 15, 1964, granting the government possession pursuant to the district court's decisions of August 5 and 6, 1964. This appeal was dismissed by the court of appeals on October 26, 1964, as frivolous, and on October 30, Mr. Justice Harlan denied an application for a stay of enforcement of the order of possession.

5(a) of the Public Buildings Act of 1959, 73 Stat. 479, 40 U.S.C., Supp. V, 604(a), which declares in the broadest language that "The Administrator [of G.S.A.] is authorized to acquire, by purchase, condemnation, donation, exchange, or otherwise, such lands or interests in lands as he deems necessary for use as sites, or additions to sites, for public buildings authorized to be constructed or altered under this Act." The construction of the building at Foley Square was specifically authorized by Congress by the Independent Offices Appropriation Act of 1962, Act of August 17, 1961, 75 Stat. 342, 349. The Committees on Public Works of the Senate and House of Representatives approved the project prior to the appropriation, pursuant to Section 7 of the Public Buildings Act of 1959, 73 Stat. 480, 40 U.S.C., Supp. V, 606.

No additional authorization was required to condemn additional land when this became necessary in the course of construction of the building at Foley Square. When Congress approves the construction of a public building, it does not approve or specify a metes and bounds description of the site of that building. In this case, Congress merely approved the construction of a building at "New York, New York." Selection of the location and size of the original site within New York City was a matter committed to the discretion of the Administrator, requiring no specific approval of Congress. Similarly, the administrative determination to enlarge the site during the construction of the building was not a matter requiring specific consideration or approval by the Public Works Committees.

It is thus clear that the condemnation in this case did not require an authorization additional to and separate from the original authorization to construct the building at Foley Square. Moreover, even if a separate authorization were required for the additional land, it would come within Section 5 of the Public Buildings Act of 1959 authorizing condemnation of "additions to sites." As Judge Dimock noted (Pet. 4a), approval of the Public Works Committees is not required for such "additions to sites." Section 7 of the Act requires approval of the Committees only for an appropriation "to construct any public building or to acquire any building to be used as a public building." The Committees have, as we have noted, already approved the construction of the Foley Square building and the privately owned building taken in the present case is not "to be used as a public building."

Because the present condemnation falls squarely within the authorization granted by the Public Buildings Act of 1959, *Maiatico* v. *United States,* 302 F. 2d 880 (CA.D.C.), is of no help to petitioner. The government's argument in that case was that it has the authority to condemn an existing building for use as a government office building without recourse to the provisions of the Public Buildings Act of 1959. While the government does not believe the *Maiatico* decision is correct, it clearly has no relevance to this case.

Finally, the public purpose for the condemnation is obvious. The principal motive for the taking was

to safeguard against human injury. A secondary motive was to protect the government against liability resulting from such injuries. The Administrator "is not barred from making a common sense adjustment in the interest of all the public." *United States ex rel. T.V.A. v. Welch*, 327 U.S. 546, 554.

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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